BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTORIA K. JESSEPH	)	
Claimant	)	
	)	
VS.	)	
	)	
EUREKA NURSING CENTER	)	
Respondent	)	Docket Nos. **1,042,186**
	)	**& 1,042,682**
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 19, 2008 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The claimant filed two separate workers compensation claims against respondent. In Docket No. 1,042,186, claimant requested medical compensation and temporary total disability compensation for an alleged June 22, 2008 work-related accident. The respondent denied claimant suffered accidental injury arising out of her employment. In Docket No. 1,042,682, claimant requested a change of physician for an accidental injury that occurred on September 20, 2008. Respondent had provided claimant medical treatment for this injury but argued claimant had failed to meet her burden of proof that such treatment was not satisfactory. It should be noted that both claims alleged injury to the left foot and lower leg. Both claims were consolidated for preliminary hearing.

At the conclusion of the preliminary hearing, there were off-the-record discussions and the ALJ then noted on the record that it would be premature to address the change of physician issue raised in Docket No. 1,042,682. Consequently, no determination was made with regard to that claim.

The Administrative Law Judge (ALJ) entered an Order for Compensation in Docket No. 1,042,186 and determined claimant suffered accidental injury arising out of and in the

course of employment. Consequently, the ALJ ordered respondent to provide temporary total disability benefits as well as medical treatment.

Respondent requested review and its Application For Appeal listed Docket Nos. 1,042,186 and 1,042,682. However, the respondent's brief just listed Docket No. 1,042,186 and raised the issue of whether the claimant sustained a personal injury arising out of and in the course of employment as a result of her alleged accidental injury on June 22, 2008. Respondent argues that claimant's injury was suffered as a result of activities of daily living and personal risk and therefore benefits should be denied.

Claimant argues the ALJ's Order should be modified to provide for payment of additional temporary total disability benefits from June 23, 2008, through July 22, 2008.

The issues for the Board's review are: Did claimant's injury result from an accident that arose out of and in the course or her employment or was it the result of the normal activities of day-to-day living? If claimant suffered a compensable injury is she entitled to additional dates of temporary total disability compensation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, as noted above, the ALJ's Order for Compensation dated November 19, 2008 was entered in Docket No. 1,042,186. No preliminary order was entered in Docket No. 1,042,682. And the parties' briefs just addressed the issues raised in Docket No. 1,042,186. However, respondent listed Docket No. 1,042,682 it its Application For Appeal. Because there was no order entered in that docket number and the respondent's brief did not contain any argument regarding the ALJ's failure to render a decision in that case, the appeal in Docket No. 1,042,682 is dismissed.

Victoria Jesseph began working as a certified nurse's aide (CNA) for respondent in August 2007. Her job duties include helping the residents with their baths, feeding, dressing, making beds and other daily activities. On June 22, 2008, claimant was making a resident's bed when she felt a pop and shooting pain in her left foot from her heel to her toes. The bed was pushed against the wall and in order to replace the sheets and covers she had to lean across the bed. She was prohibited from getting on the bed itself. Consequently, she was leaning forward with her weight on the ball of her right foot and as she was pulling the covers up she shifted her weight to the ball of her left foot when she experienced the pain in her left foot.

Claimant notified the charge nurse of her injury and then when the director of nursing came in, claimant notified her of the incident. Claimant was advised to wait and see if the pain improved but when it did not she was sent to the Greenwood County

Hospital's emergency room. An x-ray was taken which did not reveal any broken bones and claimant was told to follow-up with her own doctor. The next day, claimant contacted her own personal physician, Dr. Mark Basham, and was scheduled for a bone scan on June 26, 2008. The results of the bone scan were negative so claimant was referred to Dr. Pat Do. On July 8, 2008, Dr. Do recommended a short course of physical therapy. On July 22, 2008, claimant's left foot and ankle had improved with physical therapy and she asked to be released without restrictions in order to return to work.

Claimant testified that she had a fracture occur in her left foot while walking in 2005. She was placed in a cam walker for six weeks and then released. She then returned to full activities without significant problems with her left foot although she would occasionally have some muscle soreness in the arch of her foot.

After examining claimant on October 9, 2008, Dr. Do diagnosed claimant with left foot pain with possible peroneal tendinitis as a result of the June 22, 2008 injury. The doctor specifically noted:

> This is somewhat of a difficult case to sort out. I am asked to comment on diagnosis as well as cause and effect on an injury from 6/22/08. In the meantime the patient has reinjured the same body part in a separate accident at work. Fortunately, I have the advantage of having treated the patient after the 6/22/08 injury. She was treated conservatively and her symptoms improved slightly. Based on today's examination and the previous office visits it is my medical opinion that within a reasonable degree of medical probability the patient did suffer an injury to the left foot/peroneal tendon from her described work related injury on 6/22/2008.[1]

Respondent argues that claimant failed to meet her burden of proof that she suffered accidental injury arising out of her employment. Respondent further argues that claimant's physical activity making the bed was a normal activity of day-to-day living and as such her alleged injury is not compensable.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

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[1] P.H. Trans., Cl. Ex. 3 at 4.

[2] K.S.A. 2007 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 2007 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where

[4] *Id.* at 278.

> it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Hensley,*[5] the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Anderson*,[6] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
>
> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
>
> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

The Kansas Court of Appeals, in *Johnson,*[7] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[8]

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[5] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[6] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

[7] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. ___ (2006).

[8] *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

The Kansas Court of Appeals, in *Lietzke*,[9] stated:

> The evidence in this case clearly established that one of the hazard's [*sic*] of Lietzke's employment was prolonged standing necessary to perform his welding job. This prolonged standing caused or aggravated Lietzke's hip and groin injuries. Prolonged standing is not a normal activity of day-to-day living.

The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[10]

The facts in this case more closely resemble *Johnson* than they do *Anderson*. However, the claimant in this case differs from the claimant in *Johnson* in an important way–she did not have a preexisting condition that "looks like she had had years of degeneration and had some previous problems, and it was just a matter of time."[11]

Although making a bed can be described as a normal activity of day-to-day living, K.S.A. 2007 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holding in *Boeckmann.*[12]

The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[13] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[14] This Board Member concludes that the Legislature did not intend for the "normal activities of day-to-

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[9] *Lietzke v. True-Circle Aerospace*, No. 98,463, unpublished Court of Appeals case filed June 6, 2008, slip op. at 20-21; see also *Heller v. Conagra Foods, Inc.*, No. 96,990, unpublished Court of Appeals case filed June 22, 2007.

[10] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

[11] *Johnson*, 36 Kan. App. 2d at 788.

[12] *Boeckmann*, 210 Kan. 733.

[13] *Id.* at 737.

[14] *Johnson* at 789.

day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

Claimant testified she had to lean across the bed to grab the sheets that were against the wall in order to make the bed. She was not allowed to climb on the bed or put her knees on the bed due to cross contamination. Claimant had to lock her knees which put additional stressors on making this particular bed.

This Board Member concludes that claimant's accident and resulting disability are directly attributable to her work. It did not result from a personal risk. The fact she had broken her left foot in the past does not establish a relationship to her current diagnosis of peroneal tendinitis. Furthermore, there is no expert opinion testimony attributing the peroneal tendinitis injury suffered in claimant's accident at work to a preexisting condition. The unique manner of making the bed in this instance was part of what claimant was expected to do by her employer. Claimant's injury resulted from that activity. There is no evidence that the condition of claimant's left foot was such that any type of activity would have caused this injury. Therefore, claimant's accident arose out of the nature, conditions, obligations and incidents of her employment with respondent.

Claimant argues that she is entitled to additional weeks of temporary total disability compensation in Docket No. 1,042,186 and the ALJ erred in failing to award benefits for those weeks.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[15] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[16]

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

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[15] K.S.A. 44-551(Furse 2000).

[16] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[17]

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Thus, the ALJ did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary findings regarding temporary total disability compensation. Accordingly, claimant's appeal of this issue is dismissed but claimant may preserve the issue for final award.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[19]

WHEREFORE, it is the finding of this Board Member that the respondent's Application for Appeal in Docket No. 1,042,682 is dismissed and the Order for Compensation of Administrative Law Judge Brad E. Avery dated November 19, 2008, in Docket No. 1,042,186 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

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[17] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[18] K.S.A. 44-534a.

[19] K.S.A. 2007 Supp. 44-555c(k).